

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF NEW YORK

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YUL B-V,

Plaintiff,

v.

Civil Action No.  
3:19-CV-0017 (DEP)

ANDREW SAUL, Commissioner  
of Social Security,<sup>1</sup>

Defendant.

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APPEARANCES:

OF COUNSEL:

FOR PLAINTIFF

LACHMAN, GORTON LAW FIRM  
P.O. Box 89  
Endicott, NY 13760

PETER A. GORTON, ESQ.

FOR DEFENDANT

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United States Attorney for the  
Northern District of New York  
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100 S. Clinton Street  
Syracuse, NY 13261-7198

TIMOTHY A. RAZEL, ESQ.  
Special Assistant U.S. Attorney

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<sup>1</sup> Plaintiff's complaint named Nancy A. Berryhill, as the Acting Commissioner of Social Security, as the defendant. On June 4, 2019, Andrew Saul took office as Social Security Commissioner. He has therefore been substituted as the named defendant in this matter pursuant to Rule 25(d)(1) of the Federal Rules of Civil Procedure, and no further action is required in order to effectuate this change. See 42 U.S.C. § 405(g).

DAVID E. PEEBLES  
U.S. MAGISTRATE JUDGE

ORDER

Currently pending before the court in this action, in which plaintiff seeks judicial review of an adverse administrative determination by the Commissioner, pursuant to 42 U.S.C. §§ 405(g) and 1383(c)(3), are cross-motions for judgment on the pleadings.<sup>2</sup> Oral argument was conducted in connection with those motions on March 5, 2020, during a telephone conference held on the record. At the close of argument, I issued a bench decision in which, after applying the requisite deferential review standard, I found that the Commissioner's determination did not result from the application of proper legal principles and is not supported by substantial evidence, providing further detail regarding my reasoning and addressing the specific issues raised by the plaintiff in this appeal.

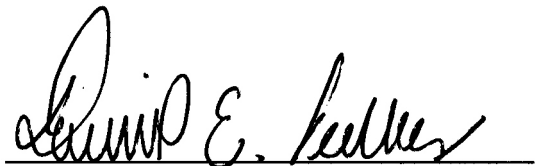
After due deliberation, and based upon the court's oral bench decision, a transcript of which is attached and incorporated herein by reference, it is hereby

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<sup>2</sup> This matter, which is before me on consent of the parties pursuant to 28 U.S.C. § 636(c), has been treated in accordance with the procedures set forth in General Order No. 18. Under that General Order once issue has been joined, an action such as this is considered procedurally, as if cross-motions for judgment on the pleadings had been filed pursuant to Rule 12(c) of the Federal Rules of Civil Procedure.

ORDERED, as follows:

- 1) Plaintiff's motion for judgment on the pleadings is GRANTED.
- 2) The Commissioner's determination that plaintiff was not disabled at the relevant times, and thus is not entitled to benefits under the Social Security Act, is VACATED.
- 3) The matter is hereby REMANDED to the Commissioner, without a directed finding of disability, for further proceedings consistent with this determination.
- 4) The clerk is respectfully directed to enter judgment, based upon this determination, remanding the matter to the Commissioner pursuant to sentence four of 42 U.S.C. § 405(g) and closing this case.

A handwritten signature in black ink, appearing to read "David E. Peebles", written over a horizontal line.

David E. Peebles  
U.S. Magistrate Judge

Dated: March 10, 2020  
Syracuse, NY

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

-----X  
YUL B.-V.,

Plaintiff,

vs.

3:19-CV-17

NANCY A. BERRYHILL, COMMISSIONER OF  
SOCIAL SECURITY,

Defendant.  
-----X

Transcript of a **Decision** held during a  
Telephone Conference on March 5, 2020, at the James  
Hanley Federal Building, 100 South Clinton Street,  
Syracuse, New York, the HONORABLE DAVID E. PEEBLES,  
United States Magistrate Judge, Presiding.

A P P E A R A N C E S

(By Telephone)

For Plaintiff: LACHMAN, GORTON LAW FIRM  
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BY: PETER A. GORTON, ESQ.

For Defendant: SOCIAL SECURITY ADMINISTRATION  
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BY: TIMOTHY A. RAZEL, ESQ.

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Official United States Court Reporter  
100 South Clinton Street  
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1 (In Chambers, Counsel present by telephone.)

2 THE COURT: I have before me a request for judicial  
3 review of an adverse determination by the Commissioner of  
4 Social Security pursuant to 42 United States Code Sections  
5 405(g) and 1383(c)(3).

6 The background is as follows: Plaintiff was born  
7 in February of 1968, he is currently 52 years of age; he was  
8 50 years old at the time of the hearing in this matter and 45  
9 at the time of the alleged onset of his disability in July of  
10 2013. Plaintiff lives in Endicott. He apparently moved from  
11 New York City to the Binghamton, New York area at some point  
12 in the not-too-distant past. He lives in a second floor  
13 apartment. The evidence is equivocal, at one point it states  
14 that he lives with a roommate, but he reported that he lived  
15 alone in September 2015. He is six foot tall and weighs  
16 approximately 158 pounds. Plaintiff has five children. In  
17 February of 2016 they ranged in ages from 7 to 17; all reside  
18 in the New York City area. Plaintiff has an eighth grade  
19 education. While in school he was in special education  
20 classes. He did not achieve a GED. Plaintiff has a driver's  
21 license but no vehicle.

22 Plaintiff stopped working in or about October of  
23 2011 due to a nonwork injury that's described at 295 and 342.  
24 He was a victim of an alleged police brutality incident.  
25 From 1995 to 2009, plaintiff worked as an installer of trash

1 compactor equipment. From 2009 to 2011, he worked as a  
2 welder.

3 Plaintiff has both physical and mental impairments.  
4 Physically, he suffered from a motor vehicle accident and an  
5 assault resulting in degenerative disk disease of the  
6 cervical and lumbar area with neck and shoulder pain as well  
7 as leg pain and tingling. He also suffers from a hearing  
8 disorder, hypertension, GERD, COPD, carpal tunnel syndrome,  
9 and Raynaud's disease. He treats primarily with Physician's  
10 Assistant Joseph Brunt. He also received injections from  
11 Physician Assistant Bryan Burke, and he treats at Lourdes  
12 Pain and Wellness with Nurse Practitioner Emily Crouse. He  
13 has had injections with reportedly good results. At one  
14 point he stated he had 75 percent relief up to two and a half  
15 to three months after the injections, that's at 702. He at  
16 another point stated he had 80 to 100 percent relief for up  
17 to three to six weeks, that's at page 703. Plaintiff uses a  
18 cane to ambulate although it is not prescribed by a medical  
19 provider. Plaintiff has not undergone physical therapy or  
20 any chiropractic intervention.

21 I note that there is one mistake in the  
22 administrative law judge's decision. At page 26, ALJ Ramos  
23 states that the diagnosis of herniated disk of the cervical  
24 and lumbar spine as noted by plaintiff's -- claimant's  
25 treating nurse practitioner and treating physician assistant

1 are not confirmed by acceptable medical sources or reflected  
2 in laboratory studies. When I reviewed the medical records,  
3 I came across magnetic resonance imaging testing that was  
4 performed on March 9, 2012 at page 367, which clearly  
5 indicates a central disk herniation at L4-5 and another at  
6 L5-S1.

7 Mentally, plaintiff suffers from post-traumatic  
8 stress disorder, depressive disorder, bipolar disorder, ADHD,  
9 alcohol use, polysubstance use and abuse disorder in  
10 remission, and opiate use disorder, also in remission. He  
11 also suffers from panic disorder and adjustment disorder.  
12 Plaintiff was hospitalized from January 13 to 14, 2015,  
13 that's at 505-06, apparently as a result of taking double and  
14 triple his medications at the time which was Wellbutrin. He  
15 was assessed a Global Assessment of Functioning or GAF score  
16 of 50 on admission and 60 upon discharge. He was also an  
17 inpatient at New Horizons from August 18, 2014 to  
18 September 2, 2014, that's at 512 and 513, to address his  
19 addictions. He suffered a relapse and was placed into a  
20 program at the Addiction Center of Broome County. At page  
21 576, a GAF score of 55 was assessed. According to plaintiff,  
22 he has not taken any drugs or alcohol since 2015, that's at  
23 page 82 of the transcript. He attends Alcoholics Anonymous  
24 meetings approximately two times per week.

25 In terms of medications, plaintiff has had many

1 over time, including hydroxyzine, ibuprofen, Prazosin for his  
2 night tremors, Quetiapine for depression, sertraline for mood  
3 swings, Zoloft, Latuda, he claims to be on the highest dose  
4 of Latuda, Wellbutrin, Vistaril, and Seroquel.

5 In terms of daily living, plaintiff is able to  
6 dress himself, groom, cook, clean, shop, do laundry, watch  
7 television, radio, he socializes, he does landscaping, he  
8 works with his hands, he bikes, and he swims. Plaintiff is a  
9 heavy smoker, has smoked for 30 years, that's at 580, 585,  
10 760 of the administrative transcript. It was reported he  
11 smokes between one half and one pack of cigarettes per day.  
12 That's at 82, 508, and 760 of the administrative transcript.  
13 Plaintiff has been convicted, including 1989, for drug sale  
14 where he was sentenced to incarceration, and for assaulting a  
15 girlfriend in July of 2014 where he received 30 days of  
16 incarceration and five years probation and an order of  
17 protection was issued.

18 Procedurally, plaintiff applied for Title II and  
19 Title XVI benefits on August 3, 2015, alleging a disability  
20 onset date of July 24, 2013. In his function report, he  
21 claims disability based on anxiety, depression, OCD, PTSD,  
22 post-acute withdrawal, and memory loss, that's at 233. I  
23 note that there is a -- there are prior unfavorable decisions  
24 with respect to earlier applications. There is a decision  
25 from July 23, 2013, and a denial of review by the Social



1 Security Administration Appeals Council on August 22, 2014.

2 In this case, Administrative Law Judge John P.  
3 Ramos held a hearing on January 4, 2018 to address the claim  
4 for benefits. ALJ Ramos issued an unfavorable decision on  
5 January 31, 2018, finding plaintiff was not disabled at the  
6 relevant times and therefore ineligible for the benefits  
7 sought. The Social Security Administration Appeals Council  
8 denied review of that opinion on November 9, 19 -- 2018,  
9 making it the final determination of the agency.

10 In his decision -- I note that I have a high regard  
11 for ALJ Ramos and I found his decision to be extremely  
12 thorough. After determining that plaintiff was insured  
13 through December 31, 2016, ALJ Ramos concluded -- he applied  
14 the familiar five-step sequential test for determining  
15 disability and concluded at step one that plaintiff had not  
16 engaged in substantial gainful activity since July 24, 2013.

17 At step two, ALJ Ramos concluded that plaintiff  
18 suffers from multiple severe impairments that impose more  
19 than minimal limitations on his ability to perform basic work  
20 functions, including degenerative disk disease of the  
21 cervical and lumbar spine, depressive disorder, bipolar  
22 disorder, attention-deficit/hyperactivity disorder, alcohol  
23 use disorder, and opiate use disorder. That's at page 15 of  
24 the administrative transcript. He rejected plaintiff's other  
25 conditions as being severe, including a hearing disorder,

1 hypertension, GERD, COPD, carpal tunnel syndrome, Raynaud's  
2 disease, stuttering, incontinence, poor circulation,  
3 blackouts, headaches, traumatic brain injury/concussion, and  
4 mental retardation.

5 At step three, ALJ Ramos concluded that none of  
6 plaintiff's conditions met or medically equaled any of the  
7 listed presumptively disabling conditions set forth in the  
8 Commissioner's regulations, considering specifically Listings  
9 1.02, 1.04, 1.07, 14.09, 1.00, 11.00, 14.00, 12.02, 12.03,  
10 12.04, 12.06, 12.08, 12.15.

11 ALJ Ramos next surveyed the available medical  
12 evidence and concluded that plaintiff is able to perform  
13 the -- or meet the exertional requirements of sedentary work,  
14 with limitations addressed primarily to his mental  
15 conditions.

16 The ALJ concluded at step four that plaintiff is  
17 not able to meet the requirements of his past relevant work  
18 due to both the SVP requirements of the work and the physical  
19 demands associated with them.

20 At step five, ALJ Ramos rejected the claim that  
21 plaintiff has a marginal education or is illiterate,  
22 concluded that plaintiff, if able to perform a full range of  
23 sedentary work, the Medical Vocational Guidelines and  
24 specifically Rule 201.19 would direct a finding of no  
25 disability. ALJ Ramos properly considered whether, under SSR

1 85-15, the additional limitations he placed in the RFC would  
2 result in a loss of the job base on which the Grids were  
3 predicated and concluded that there would be no loss in  
4 plaintiff's ability to perform the basic mental demands of  
5 unskilled work, and therefore under Grid Rule 201.19,  
6 plaintiff would be deemed not disabled.

7 As you know, my task is limited. I must determine  
8 whether correct legal principles were applied and the  
9 determination that resulted is supported by substantial  
10 evidence. Substantial evidence standard is a rigid one. It  
11 is described in *Brault v. Social Security Administration*, 683  
12 F.3d 443, by the Second Circuit as being even more demanding  
13 than the clearly erroneous standard. Substantial evidence of  
14 course is defined to mean such relevant evidence as a  
15 reasonable mind might accept as adequate to support a  
16 conclusion. In *Brault*, the Second Circuit noted that the  
17 standard means once an ALJ finds facts, they can be rejected  
18 only if a reasonable fact finder would have to conclude  
19 otherwise.

20 In this case, plaintiff has raised three arguments  
21 but really the third depends on the first and second.  
22 Plaintiff contends that in light of the fact that plaintiff  
23 was 27 days away from 50 years of age or meeting the  
24 closely-approaching advanced age category under the Grids,  
25 the higher age category should have been applied.

1           Secondly, he challenges the RFC finding and  
2 specifically the failure to include any workplace and  
3 attendance limitations based on the medical evidence.

4           The third, of course, is that he failed to consult  
5 with a vocational expert and that would depend on the  
6 additional limitations associated with work pace and  
7 attendance that should have been included, according to  
8 plaintiff, in the residual functional capacity.

9           I address the Grids issue first. Under 20 C.F.R.  
10 Section 404.1563, which addresses the age as a vocational  
11 factor, it is noted in relevant part, "We will not apply the  
12 age categories mechanically in a borderline situation. If  
13 you are within a few days to a few months of reaching an  
14 older age category, and using the older age category would  
15 result in a determination or decision that you are disabled,  
16 we will consider whether to use the older age category after  
17 evaluating the overall impact of all the factors of your  
18 case." Unfortunately the regulations do not articulate  
19 specifically what factors are relevant and should be  
20 considered.

21           The Commissioner concedes that this is a borderline  
22 case, and that it matters because if the higher age category  
23 was used in a Grid analysis, a finding of disability would be  
24 directed. I do know that the Program Operations Manual  
25 System, or POMS, does indicate certain factors that an

1 administrative law judge should consider, proximity to next  
2 older age category, proximity to the next lower education  
3 category, any vocational disorder from past relevant work  
4 history not considered already in determining the proper Grid  
5 Rule, and any nonexertional limitations not already  
6 considered. I agree with the Commissioner that the -- that  
7 this is a borderline case under *Battaglia v. Commissioner of*  
8 *Social Security*, 2019 WL 3764660 from the Western District of  
9 New York 2019, and *Polyak v. Berryhill*, 2018 WL 6418298, it  
10 is a decision from the Western District of New York also from  
11 2018.

12 I also agree with the Commissioner that the Western  
13 District's decision from Judge Wolford in the Western  
14 District of New York is distinguishable. It is clear that in  
15 that case, the administrative law judge did not address the  
16 issue of the age categories and the court found that that was  
17 error.

18 I also agree with the Commissioner that the matter  
19 is addressed to the sound discretion of the administrative  
20 law judge, and -- but I don't agree that it is not subject to  
21 any judicial review if the resulting decision is based on  
22 erroneous conclusions or indefensible conclusions.

23 In this case, it's clear, as plaintiff has argued,  
24 that very heavily factored by the administrative law judge  
25 was the claim that plaintiff, plaintiff's condition would

1 improve, and I didn't find any medical evidence in the record  
2 to support that conclusion. I don't know if the  
3 administrative law judge would have arrived at the same  
4 decision if he did not believe that there was going to be  
5 improvement, but I think that the -- that does infect the  
6 decision of whether or not to apply the next higher age  
7 category, so I find error in that regard.

8           The second issue is work pace and absenteeism.  
9 Nurse Practitioner Crouse at 793-794 found that plaintiff  
10 would be off task more than 33 percent of the time and absent  
11 more than four times per month. Physician's Assistant Brunt  
12 made similar findings at 795 to 796. Dr. Togias, plaintiff's  
13 psychiatrist, opined that plaintiff would be off task more  
14 than 33 percent of the time and absent at least three times  
15 per month at 798-799. Dr. Slowik, the consultative examiner,  
16 at 582 concluded that plaintiff's ability to maintain a  
17 schedule was moderately to markedly impaired. Dr. Kamin at  
18 121 found moderate limitations in the plaintiff's ability to  
19 maintain a schedule. I note in that regard that when he went  
20 through his findings of fact, page 116, which he incorporates  
21 by reference on 122, Dr. Kamin misstates the opinion of  
22 Dr. Slowik. He states that she said that, able to follow and  
23 understand simple directions and instructions, perform simple  
24 tasks, maintain a regular schedule, perform complex tasks  
25 independently, make appropriate decisions and deal with

1 stress are moderately limited when in fact, when dealing with  
2 the schedule issue, Dr. Slowik at page 582 actually stated  
3 that claimant's ability to maintain a regular schedule was  
4 moderately to markedly impaired.

5 I do note that the ALJ did address this issue at  
6 page 30 and also at pages 36 to 37 of his decision, but I  
7 didn't find any contrary opinion. The closest thing to a  
8 contrary opinion would be Dr. Kamin's, and Dr. Kamin's is  
9 infected for two reasons. First of all, it doesn't afford  
10 meaningful judicial review because he makes only a conclusory  
11 statement without -- that plaintiff can perform unskilled  
12 light work without any explanation and narrative as to the  
13 specific abilities, functional abilities of the plaintiff as  
14 required and as would be helpful to permit judicial review.  
15 The case law is very clear that when there is uncontradicted  
16 medical opinions, they can be overcome only if there is -- if  
17 the evidence to the contrary is overwhelmingly compelling,  
18 which I did not find.

19 I also found that the administrative law judge's  
20 stated reasonings for rejecting the opinions of Dr. Slowik,  
21 who examined the plaintiff, and Dr. Togias, who is his  
22 treating physician, are not supported. I agree with  
23 plaintiff that the statement that plaintiff, there's no  
24 evidence that plaintiff was not able to make his doctor's  
25 appointment is belied by the record which is replete with

1 references to no-shows.

2 When it comes to activities of daily living, that's  
3 always, it's always difficult to translate what a plaintiff  
4 is able to do in his or her daily life with working eight  
5 hours per day, five days per week on a sustained basis. And  
6 I didn't find anything in the activities of daily living that  
7 would suggest to me that plaintiff is capable of performing  
8 and maintaining a regular schedule.

9 So the errors at point one and point two clearly  
10 infect the point three step five determination of no  
11 disability and so I find that the matter needs to be vacated  
12 and remanded. I don't find persuasive evidence of  
13 disability, quite frankly this was a very close case and I  
14 wrestled with it quite a bit, and so I think this is  
15 something that should be remanded without a directed finding  
16 of disability so that the matter can be reconsidered,  
17 including the 27-day issue and the residual functional  
18 capacity, and specifically, the ability of plaintiff to  
19 maintain a regular schedule and remain on task.

20 Thank you both for excellent presentations, I  
21 enjoyed working with you. Have a great day.

22 MR. RAZEL: Thank you, your Honor.

23 MR. GORTON: Thank you, your Honor.

24 (Proceedings Adjourned, 11:39 a.m.)  
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CERTIFICATE OF OFFICIAL REPORTER

I, JODI L. HIBBARD, RPR, CRR, CSR, Federal  
Official Realtime Court Reporter, in and for the  
United States District Court for the Northern  
District of New York, DO HEREBY CERTIFY that  
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Dated this 5th day of March, 2020.

/S/ JODI L. HIBBARD  
JODI L. HIBBARD, RPR, CRR, CSR  
Official U.S. Court Reporter